



TEXAS CENTER
★
FOR THE JUDICIARY

2022 Criminal Justice Conference

Legal Issues in Texas Wrongful Conviction Cases

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Cory Session of Fort Worth, center, wipes his eyes as Texas Gov. Rick Perry, right, and Texas state Senator Wendy Davis, left, bow their heads in prayer during a ceremony to unveil a Timothy Cole memorial in Lubbock, Wednesday, Sept. 17, 2014. Twenty-eight years to the day after Timothy Cole was falsely convicted of raping a Texas Tech student, Lubbock and state officials unveiled a statue honoring the U. S. Army veteran on a street corner not far from where the student was abducted. AP/Lubbock Avalanche-Journal



TIM COLE STATUE UNVEILING



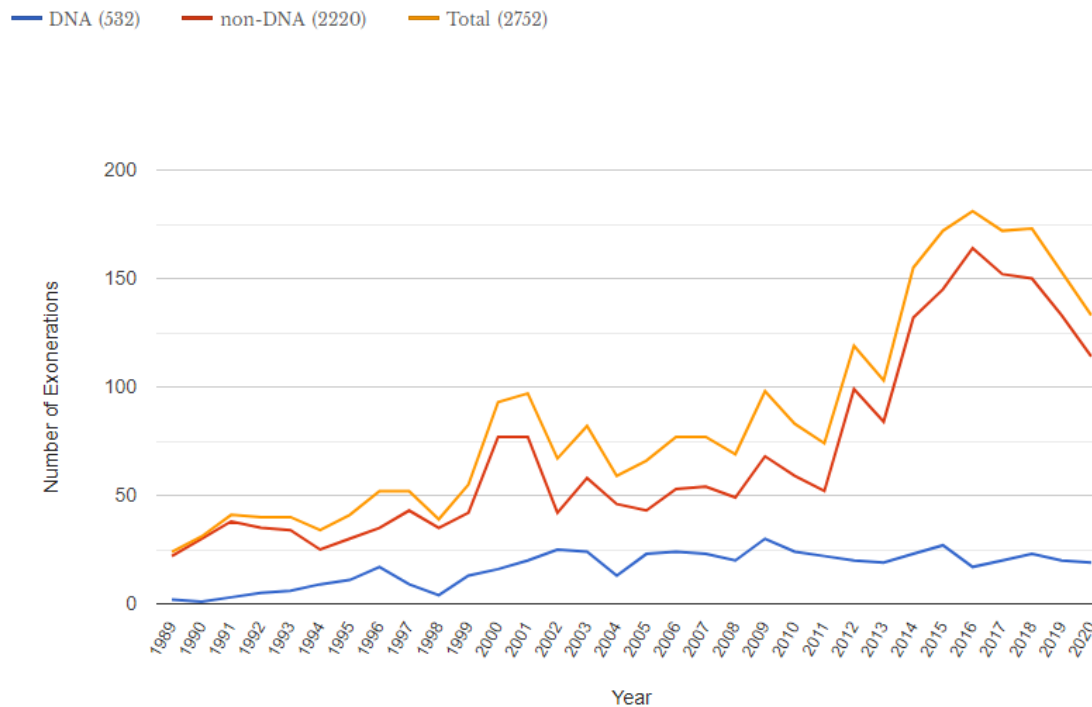
TIM COLE STATUE UNVEILING





EXONERATIONS BY YEAR: DNA AND NON-DNA

National Registry of Exonerations
7/13/2021 Total = 2812



Roll cursor over the graph to see totals for each year. *National Registry of Exonerations: public use permitted.*

Exonerations Graph By:

| Year: DNA and Non-DNA | Year and Type of Crime |

| Conviction Year and Type of Crime | Race/Ethnicity and Type of Crime | Contributing Factor and Type of Crime |

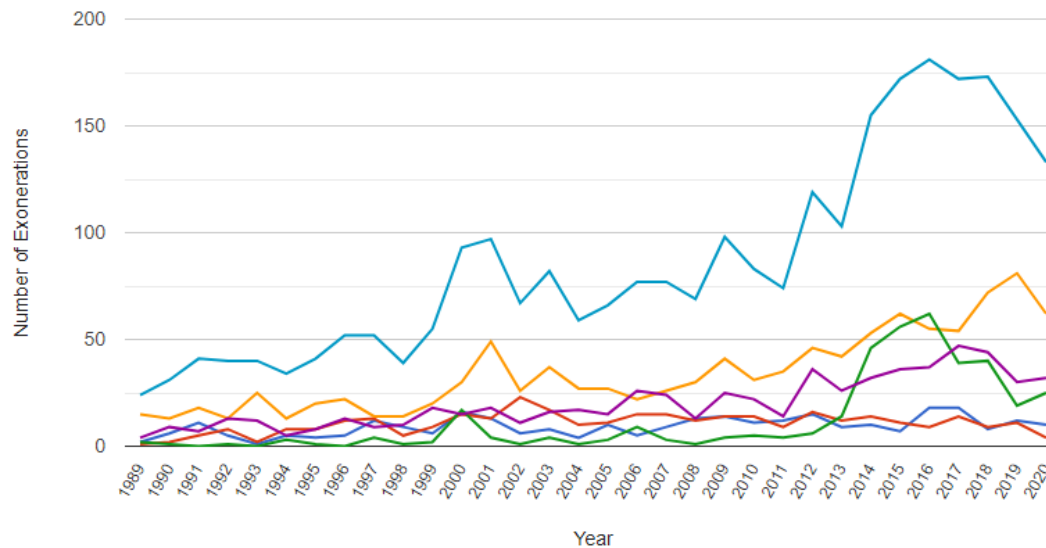


EXONERATIONS BY YEAR AND TYPE OF CRIME

National Registry of Exonerations

7/13/2021 Total = 2812

Child Sex Abuse (294) Sexual Assault (341) Homicide (1095) Drug Possession or Sale (378) Other (644)
All Crimes (2752)



Roll cursor over the graph to see totals for each year. *National Registry of Exonerations: public use permitted.*

Exonerations Graph By:

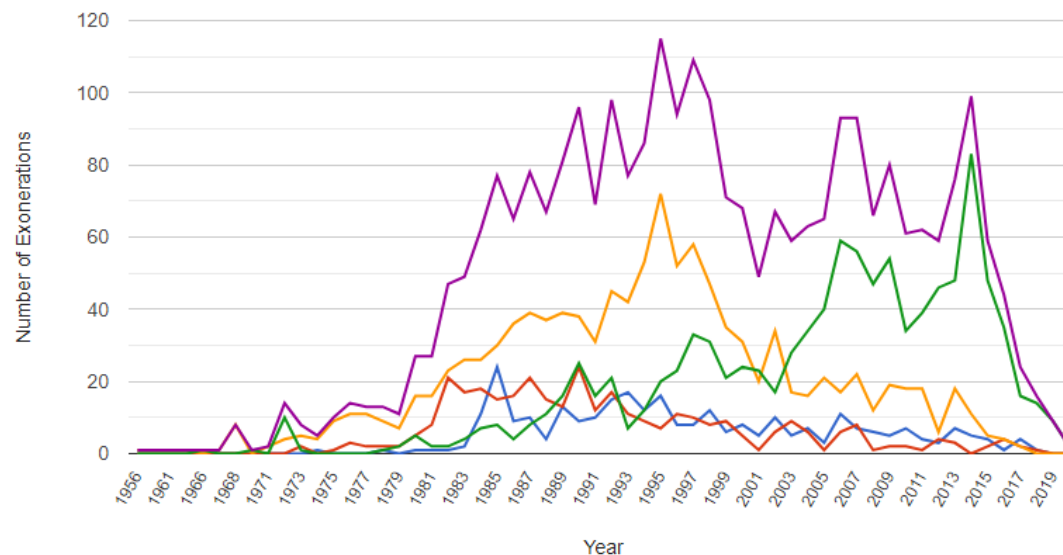
| Year: DNA and Non-DNA | Year and Type of Crime |

| Conviction Year and Type of Crime | Race/Ethnicity and Type of Crime | Contributing Factor and Type of Crime |

EXONERATIONS BY YEAR OF CONVICTION AND TYPE OF CRIME

National Registry of Exonerations
7/13/2021 Total = 2812

Child Sex Abuse (294) Sexual Assault (343) Homicide (1127) Other (1048) All Crimes (2812)



Roll cursor over the graph to see totals for each year. *National Registry of Exonerations: public use permitted.*

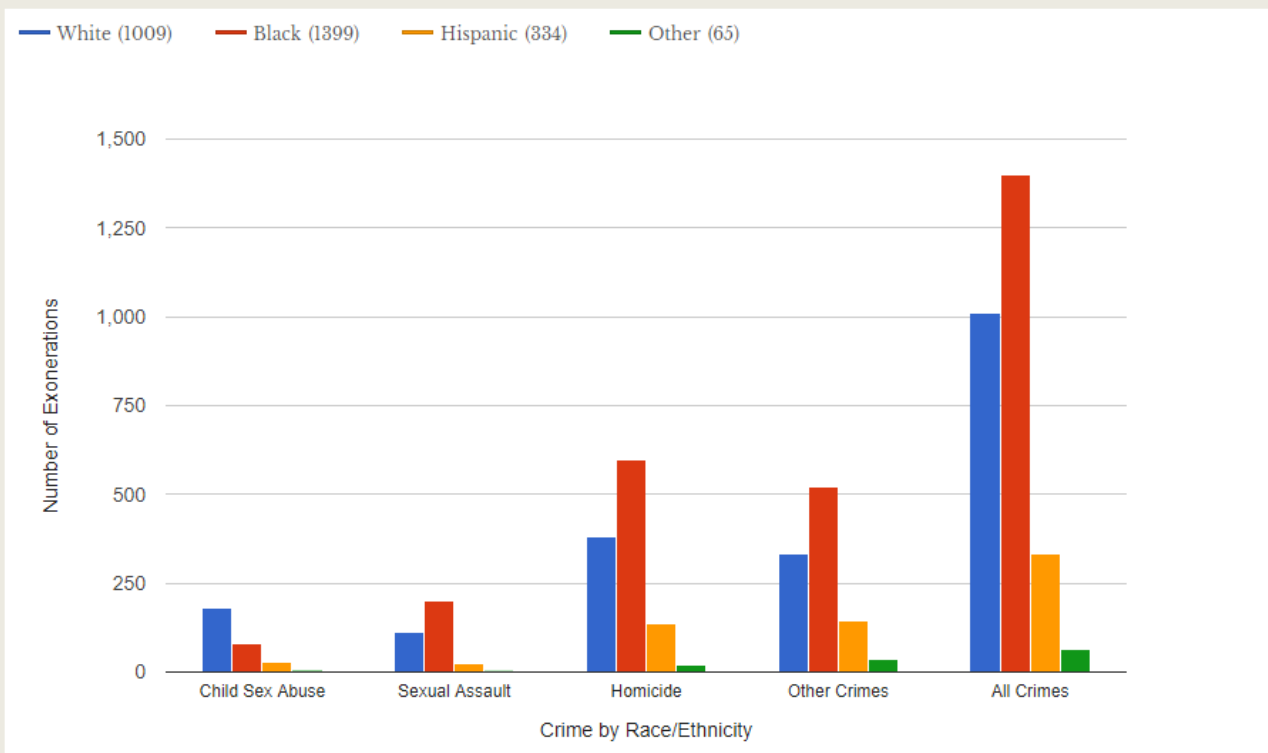
Exonerations Graph By:

| Year: DNA and Non-DNA | Year and Type of Crime |

| Conviction Year and Type of Crime | Race/Ethnicity and Type of Crime | Contributing Factor and Type of Crime |

EXONERATIONS BY RACE/ETHNICITY AND CRIME

National Registry of Exonerations
7/13/2021 Total = 2812



Roll cursor over the graph to see totals by race/ethnicity. *National Registry of Exonerations: public use permitted.*

Exonerations Graph By:

| Year: DNA and Non-DNA | Year and Type of Crime |

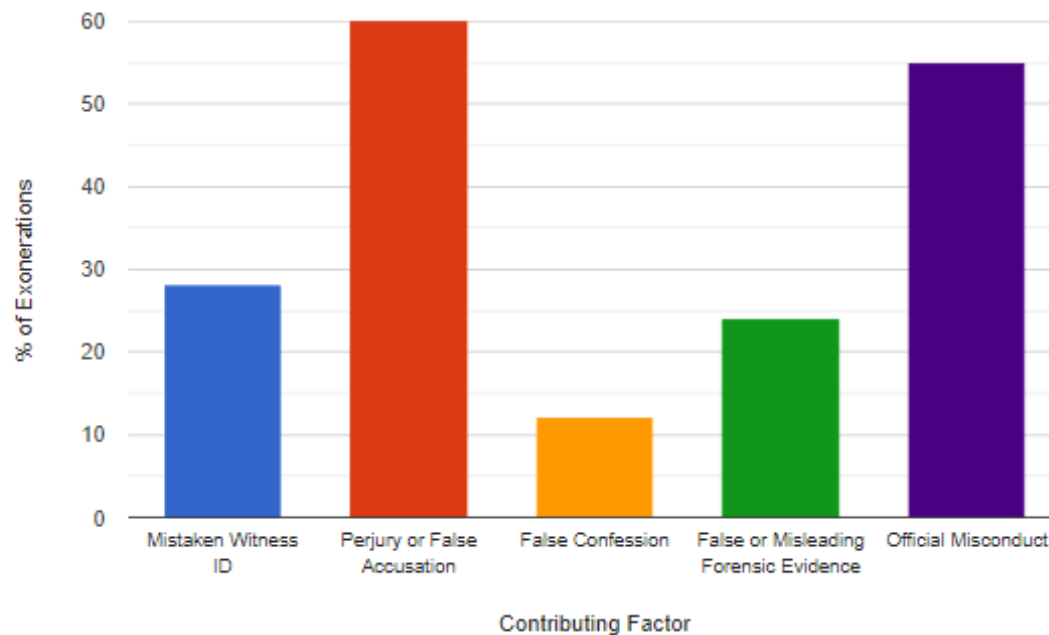
| Conviction Year and Type of Crime | Race/Ethnicity and Type of Crime | Contributing Factor and Type of Crime |



% EXONERATIONS BY CONTRIBUTING FACTOR

National Registry of Exonerations

7/13/2021 Total = 2812

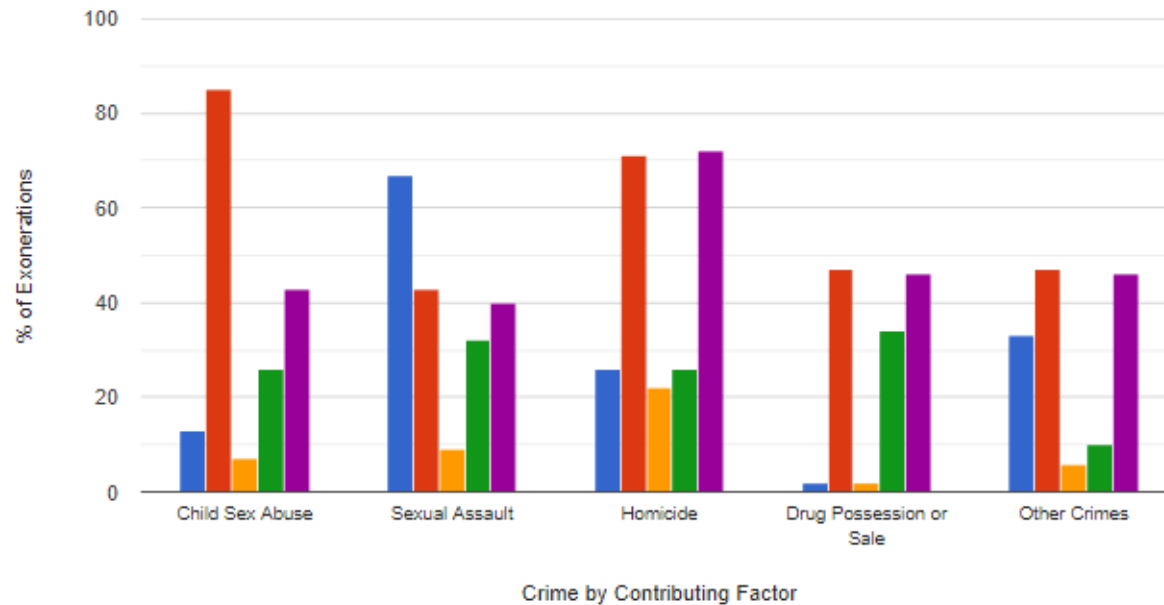


% EXONERATIONS BY CONTRIBUTING FACTOR AND TYPE OF CRIME

National Registry of Exonerations

7/13/2021 Total = 2812

■ Mistaken Witness ID ■ Perjury or False Accusation ■ False Confession ■ False or Misleading Forensic Evidence
■ Official Misconduct



Roll cursor over the graph to see totals by factor. Cases have multiple factors, so bars total more than 100%.

National Registry of Exonerations: public use permitted.

Exonerations Graph By:

| Year: DNA and Non-DNA | Year and Type of Crime |
| Conviction Year and Type of Crime | Race/Ethnicity and Type of Crime | Contributing Factor and Type of Crime |



"Injustice anywhere is a threat to justice everywhere." Martin Luther King, Jr.

354

Number of DNA
Exonerations

152

Number of Alternative
Perpetrators Identified

Help us free those who have been wrongfully convicted,
and reform our criminal justice system.

Get Involved

THE CAUSES

As the pace of DNA exonerations has grown across the country in recent years, wrongful convictions have revealed disturbing fissures and trends in our criminal justice system.

TEXAS ACTUAL INNOCENCE STANDARD

Free Standing Actual Innocence Claim:

Ex Parte Elizondo, 947 S.W.2d 202 (1996)

Applicant must show, by clear and convincing evidence, that newly discovered or newly available evidence of actual innocence unquestionably established innocence.

NEWLY DISCOVERED OR AVAILABLE EVIDENCE

Newly discovered evidence is evidence that was not known to the applicant at the time of trial and could not have been known to him even with the exercise of due diligence.

***Brown*, 205 S.W.3d 538**

Newly available evidence is evidence that may have been known to the applicant but was not available for his use based on factors beyond his control. *Calderon*, 309 S.W.3d 64

Ex Parte Brown,
205 S.W.3d 538 (2006)

Recantation affidavit that was presented in motion for new trial was not newly discovered or available when presented again in writ application.

NEWLY DISCOVERED OR NEWLY AVAILABLE EVIDENCE:

Ex Parte Calderon, 309 S.W.3d 64 (2010)

Child victim's recantation was newly available when it was unavailable to applicant at time of no contest plea

Child's recantation was made prior to plea but was not available to applicant at the time of the plea.

ACTUAL INNOCENCE STANDARD

Court must examine the new evidence in light of the evidence presented at trial

To grant relief court must believe that no rational juror would have convicted in light of the newly discovered evidence.

ACTUAL INNOCENCE STANDARD

DNA

New Scientific Evidence

Recantations

New Witnesses

Other New Evidence

RECONTATIONS

Ex Parte Thompson, 153 S.W.3d 416 (2005)

Complainant, daughter of Applicant, provided affidavit and testimony stating that sexual abuse never occurred.

Trial court found recantation credible

Expert witness testimony supported the recantation

RECONTATIONS

Ex Parte Elizondo, 947 S.W.2d 202 (1996)

**Stepson recanted testimony that claimed
Elizondo sexually abused him**

**Father of child manipulated him and his brother
into making allegations**

GUILTY PLEAS

***Ex Parte Tuley*, 109 S.W.3d 388 (2002)**

Recantation after guilty plea.

Actual innocence claims are not barred by guilty plea.

2015 – 68 out of 157 nationwide were cases where defendant pled guilty.

EX PARTE NAVARIJO,
433 S.W.3d 558 (2014)

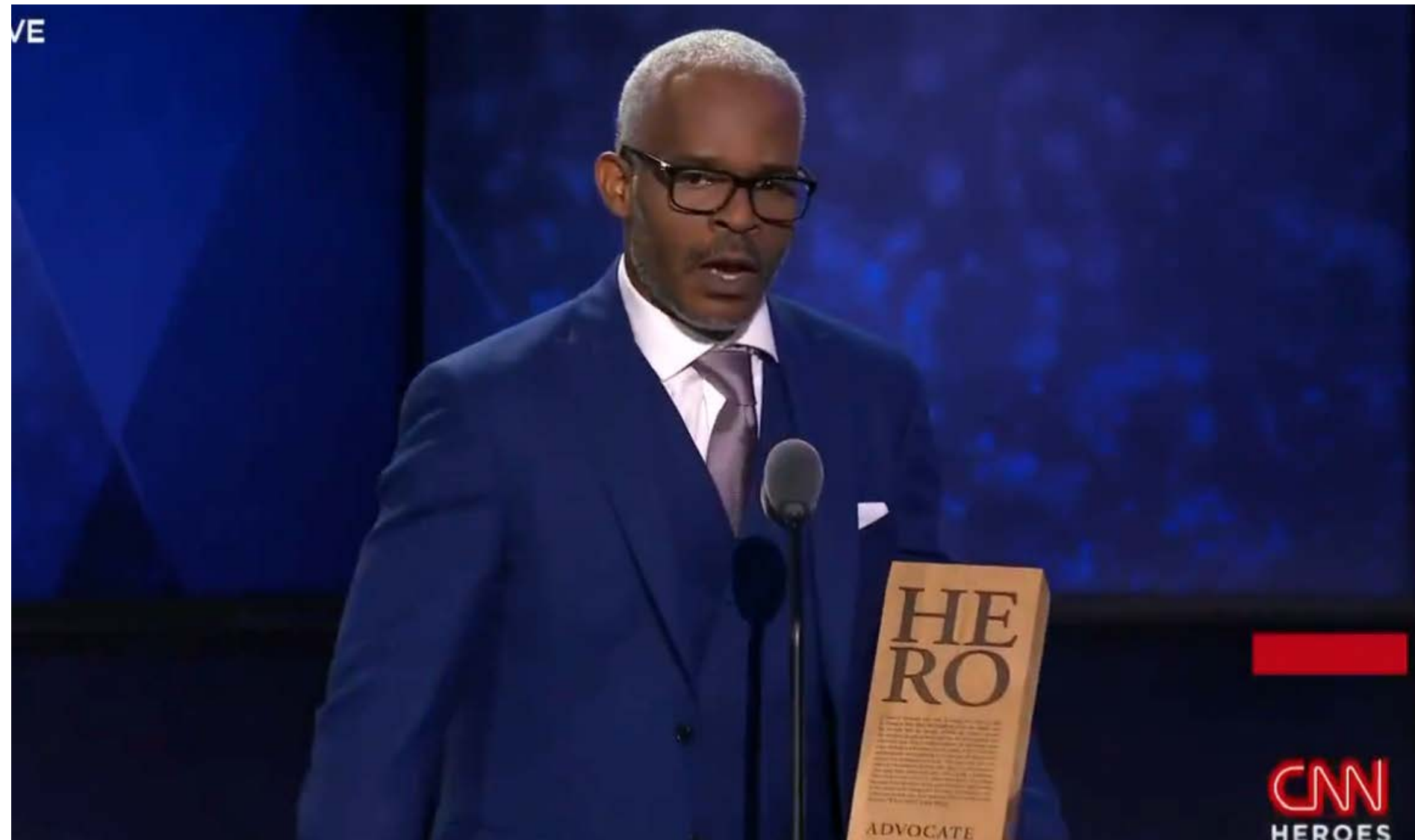
**Complainant's recantation alone
insufficient to prove actual innocence.**

**Court considers entire record in assessing
actual innocence based on recantation,
even if recantation itself is credible.**

EX PARTE RICHARD RAY MILES,
359 S.W.3D 647 (2012)

Newly discovered evidence supported actual innocence claim; eyewitness, who was the only witness to identify petitioner, recanted his identification of petitioner as shooter, two undisclosed police reports identified other possible suspects for the murder, an individual was identified as the source of a previously unidentified fingerprint at the crime scene, and gunshot residue expert stated that she would report petitioner's test results as negative for gunshot residue under today's standards.

VE



NON-RECANTATION ACTUAL INNOCENCE CASE

**Defendant actually innocent of duty to register
as a sex offender.**

***Ex Parte Harbin,*
297 S.W.3d 283 (2009)**

**Defendant not actually innocent of duty to
register as a sex offender**

***Ex parte Wahlgren,*
2017 WL 1496966 (2017)**

***EX PARTE SONIA CACY*, No. 2016 WL
6525721 (2016)**

Cacy convicted of an arson murder based on false lab report that claimed there was gasoline on her uncle's clothing.

Trial Court finds Cacy is actually innocent.

Court of Criminal Appeals Agrees

THE DAILY POST

Texas Court of Criminal Appeals Declares Sonia Cacy Actually Innocent

It's a victory two decades in the making for one of Texas' seminal arson cases.

By Brantley Hargrove

November 3, 2016

💬 0



Thinkstock

Sonia Cacy, who was wrongfully convicted by a Fort Stockton jury in 1993 of burning her uncle to death, has at last been declared actually innocent. On Wednesday, the Texas Court of Criminal Appeals granted relief on several grounds, concluding her attorney had failed her at trial, and that the evidence used to convict her was not only false, but rooted in unreliable science.



SAN ANTONIO FOUR

**Kristie Mayhugh
Elizabeth Ramirez
Cassandra Rivera
Anna Vasquez**

***Ex parte Mayhugh,*
512 S.W.3d 285 (2016)**

**Found actually innocent by Court of Criminal Appeals
on November 23, 2016**

SAN ANTONIO FOUR

Two young girls testified that the four women sexually assaulted them

One of the girls, now an adult, recants accusations

Other girl does not recant

Recantation supported by expert testimony

State's medical evidence, that one of the girls had physical signs of abuse, is recanted by doctor based on new science

SAN ANTONIO FOUR

“We conclude that now, with this clear and convincing evidence establishing innocence combined with the lack of reliable forensic opinion testimony corroborating the fantastical allegations in this case, no rational juror could find any of the four Applicants guilty of any of the charges beyond a reasonable doubt.”

Court of Criminal Appeals,

November 23, 2016

SAN ANTONIO FOUR

“It has been suggested that the term ‘actual innocence’ is inappropriate because applicants who are successful when raising a claim of actual innocence never truly prove that they did not commit the offense. But when the presumptions are reversed, the State does not have to prove that a defendant is definitively guilty.

**. . .
Those defendants have won the right to proclaim to the citizens of Texas that they did not commit a crime. That they are innocent. That they deserve to be exonerated. These women have carried that burden. They are innocent. And they are exonerated. This Court grants them the relief they seek.”**

Court of Criminal Appeals, November 23, 2016



**EX PARTE LYDELL GRANT,
622 S.W.3d 392 (2021)**

**Defendant found actually innocent of murder
based on DNA identifying the true perpetrator.**

True perpetrator confessed.

**Multiple eyewitnesses erroneously identified
Grant as person seen stabbing victim.**



BREAKING NEWS Residents near recycling plant fire in Hockley being evacuated, sheriff's office says [Read More »](#)

LOCAL NEWS

Lydell Grant declared 'actually innocent' by Texas Court of Criminal Appeals

Houston police have arrested and charged a new suspect with murder after finding more evidence, the district attorney's office said.



Author: Ciara Rouege (KHOU)

Published: 1:39 PM CDT May 19, 2021

Updated: 10:12 PM CDT May 19, 2021



HOUSTON — [Lydell Grant](#), a Houston man sentenced to life in prison for murder, has been found "actually innocent" almost a decade after he was convicted.

Grant, 44, was [released on bond back in 2019](#) after the [Innocence Project](#) got involved with his case.

Now that his name has been cleared, he can truly be free.

**EX PARTE OTIS MALLET, JR.
602 S.W.3d 922 (2020)**

**EX PARTE STEVEN CRAIG MALLET,
620 S.W.3d 797 (2021)**

Defendants found actually innocent of delivery of controlled substance.

Only evidence against the Mallet brothers was the testimony of disgraced Houston narcotics detective Gerald Goines.

DRUG WAR

A Houston Man Framed on Drug Charges Is Suing the Lethally Corrupt Cop Who Sent Him to Prison

Otis Mallet's ordeal, like the deaths of Dennis Tuttle and Rhogena Nicholas, involved a fictional drug purchase.

JACOB SULLUM | 8.20.2021 5:05 PM



Gerald Goines (HPD)

Ten years ago, Otis Mallet was convicted of selling crack cocaine in Houston based on a transaction that prosecutors and state courts eventually concluded never happened. But in the meantime, Mallet was sentenced to eight years in prison, of which he served two before he was released on parole. This travesty might never have come to light but for the scrutiny that followed a deadly 2019 drug raid orchestrated by Gerald Goines, the same narcotics officer who framed Mallet. That operation, which killed a middle-aged couple, Dennis Tuttle and Rhogena Nicholas, whom Goines portrayed as heroin dealers, was likewise based on a fictional drug purchase.

**EX PARTE STEVEN MARK CHANEY,
563 S.W.3d 239 (2018)**

Defendant found actually innocent based on newly discovered evidence, including evolution of body of science of bite mark comparisons, undisclosed *Brady* material and post-conviction DNA testing of evidence excluding defendant as contributor.

NEWS & POLITICS

“It’s the Best Day of My Life”: Texas Man Convicted on “Junk Science” Declared Innocent

Steven Mark Chaney will be paid \$2.5 million by the state of Texas, which he’ll use to support his prison ministry.



By Michael Hall

December 19, 2018



Steven Chaney, taken in the November 2015 bite-mark meeting.

Photograph by Cooper Neill

EX PARTE RICHARD BRYAN KUSSMAUL, ET AL, 548 S.W.3d 606 (2018)

**Four Defendants
Three Pled Guilty to Sexual Assault
One Found Guilty of Capital Murder**

Insufficient evidence supported finding that habeas corpus petitioners, one of whom was convicted of capital murder and three of whom had pled guilty to sexual assault and had testified against the one who was convicted of capital murder, were entitled to relief under the actual-innocence standard, despite new DNA evidence favorable to petitioners.

EX PARTE RICHARD BRYAN KUSSMAUL, ET AL

The petitioners who had pled guilty, and who claimed that they had been bullied and coerced to confess, had failed to withdraw their pleas when the promises of leniency and threats of the death penalty were no longer on the table, counsel for one of the petitioners could not recall petitioner making any claim that the authorities had forced his confession, and prosecutor testified that he had had no complaints that the pleas had been coerced.

UNCONSTITUTIONAL STATUTE

Online solicitation of a minor statute declared unconstitutional in *Ex Parte Lo*, 424 S.W.3d 10 (2013)

Writs granted under *Lo* are not “actual innocence” findings. *Ex Parte Fournier*, 473 S.W.3d 789 (2015)

Fournier actually engaged in the conduct, so no new evidence of innocence.

EX PARTE MABLE,
443 S.W.3d 129 (2014)

The term “actual innocence” only applies in circumstances where the accused did not actually commit the charged offense or any possible lesser included offense.

Subsequent lab testing on drug case showing no drugs does not prove actual innocence.

***SCHLUP* ACTUAL INNOCENCE CLAIM**

***Schlup v. Delo*, 513 U.S. 298 (1995)**

Actual innocence itself does not provide basis for relief

Actual innocence is used as a gateway to raise otherwise barred claims

Lower burden on applicant: requires preponderance of the evidence instead of the clear and convincing evidence standard on freestanding actual innocence claim

TEXAS CONDIFICATION OF *SCHLUP*

Art. 11.07, Sec. 4(a)(2), C.C.P. allows subsequent writ when, “by a preponderance of the evidence, but for a violation of the United States Constitution, no rational juror could have found the applicant guilty beyond a reasonable doubt.”

EX PARTE BILLY FREDERICK ALLEN, 2009
WL 282739

Allowed subsequent writ raising an otherwise procedurally barred ineffective assistance of counsel claim on basis that Allen proved he was actually innocent under *Schlup* and Art. 11.07, Sec. 4(a)(2)

DEFINITION OF EXONERATION FROM THE NATIONAL REGISTRY OF EXONERATIONS

A person has been exonerated if he or she was convicted of a crime and later was either (1) declared to be factually innocent by a government official or agency with the authority to make that declaration; or (2) relieved of all the consequences of the criminal conviction by a government official or body with the authority to take that action.

NATIONAL REGISTRY OF EXONERATIONS

As of July 2021

2,836 exonerations nationwide since 1989

397 exonerations in Texas since 1989

Texas has more exonerations than any other state

**Exoneration refers to more than just actual
innocence finding**

WRONGFUL CONVICTION COMPENSATION (TIM COLE COMPENSATION ACT)

A person is entitled to compensation if:

- He served in whole or in part a sentence in prison, and**
- He has received a full pardon on the basis of innocence for the crime for which he was sentenced, or**
- He has been granted relief in accordance with a writ of habeas corpus that is based on a court finding or determination that the person is actually innocent of the crime for which the person was sentenced, or**

WRONGFUL CONVICTION COMPENSATION (TIM COLE COMPENSATION ACT)

He has been granted relief in a writ of habeas corpus and the state district court has issued an order dismissing the charge and the dismissal order is based on a motion to dismiss in which the state's attorney states that no credible evidence exists which inculcates the defendant, and the state's attorney states that he believes the defendant is innocent.

Tex. Civ. Prac. & Rem. Code

§103.001 to 103.154

WRONGFUL CONVICTION COMPENSATION (TIM COLE COMPENSATION ACT)

The amount of compensation paid to a wrongfully convicted person under this statute is \$80,000.00 per year multiplied by the number of years the person served in prison in a lump sum and the same amount in an annuity for the rest of his life. Tex. Civ. Prac. & Rem. Code §103.052 and 103.053

PARDONS FOR INNOCENCE

The board will recommend the governor grant a pardon on the basis of innocence upon the receipt of:

- (1) a written recommendation of at least two of the current trial officials of the sentencing court, with one trial official submitting documentary evidence of actual innocence; or**
- (2) a certified order or judgment of a court having jurisdiction accompanied by a certified copy of the findings of fact and conclusions of law where the court recommends that the Court of Criminal Appeals grant state habeas relief on the grounds of actual innocence.**

Tex. Admin. Code 37 §143.2

COMMON CAUSES OF WRONGFUL CONVICTIONS

Inaccurate Eyewitness Identification

False Informant Testimony

False Confessions

Invalid Scientific Evidence

Ineffective Assistance of Counsel

False Testimony From State Witnesses

Expert Testimony on Reliability of Eyewitness Identification Procedures

***Tillman v. State*, 354 S.W.3d 425 (2011)**

The court held that expert testimony on the reliability of eyewitness identification is admissible.

TILLMAN V. STATE

“Nationwide, 190 of the first 250 DNA exonerations involved eyewitnesses who were wrong. BRANDON L. GARRETT, *Convicting the Innocent: Where Criminal Prosecutions Go Wrong* 8-9, 279 (2011). In Texas, reports indicate 80 percent of the first 40 DNA exonerations involved an eyewitness identification error. Innocence Project of Texas, *Texas Exonerations-At a Glance* (2011), <http://ipoftexas.org/index.php?action=at-a-glance>.”

Court of Criminal Appeals’ Opinion

ART. 38.20, C.C.P.

Photographic and Live Lineup Procedures

**Requires every law enforcement agency
in state to adopt a written policy
regarding photographic and live lineup
identification procedures.**

ART. 38.20, C.C.P.

Policy must be based on

- 1. Research on eyewitness memory**
- 2. Best practices**
- 3. Evidence based practices**

DALLAS COUNTY DNA EXONERATIONS AS OF MARCH 29, 2018

Charles Chatman
Cornelius Dupree
Jerry Lee Evans
Wiley Fountain
Larry Fuller
James Curtis Giles
Donald Wayne Good
Andrew Gossett
Eugene Henton
Raymond Jackson
EK
Johnnie Lindsey
Thomas McGowan
Steven Phillips

Johnny Pinchback
David Shawn Pope
Billy James Smith
Keith E. Turner
James Waller
Patrick Waller
Gregory Wallis
James Curtis Williams
James Lee Woodward
Billy Wayne Miller
Anthony Massingill
Michael Phillips
Ricky Wyatt



From L to R: IPTX board member Russell Wilson, CIU director Cynthia Garza, exoneree Richard Miles, exoneree Christopher Scott, exoneree Johnny Pinchback, district attorney Faith Johnson, IPTX board member Cory Session, exoneree Billy Smith, exoneree Charles Chatman, IPTX board president Gary Udashen.

DNA AND FALSE IDENTIFICATION

***EX PARTE PATRICK WALLER,
2008 WL 4356811 (2008)***

- **Two men and two women kidnapped and taken to abandoned house where the women are sexually assaulted and men pistol whipped.**
- **Three of the four victims identified Waller as assailant.**
- **Fourth victim unable to make identification.**
- **Waller cleared by DNA.**
- **True assailant identified by DNA and confessed.**

DNA AND FALSE IDENTIFICATION

***Ex Parte Johnny Edward Pinchback,
2011 WL 2364318 (2011)***

Two teenage girls sexually assaulted.

Girls later saw a man in apartment complex parking lot they thought was the assailant.

They picked Pinchback's picture from photo lineup.

Pinchback convicted and received 99 years in prison.

DNA proved that Pinchback was innocent.



SUPPRESSION OF EXCULPATORY EVIDENCE

Suppression by the prosecution of evidence favorable to an accused violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.

**Brady v. Maryland
373 U.S. 83 (1963)**

THE DALLAS COUNTY EXPERIENCE

Opening files of old convictions revealed many cases with withheld exculpatory evidence:

- State failed to disclose two police reports that identified two other possible suspects.**

Ex Parte Miles,

359 S.W.3d 647 (2012)

- State withheld photograph and police report which support defendant's defense of misidentification.**

Ex Parte Wyatt,

2012 WL 1647004 (2012)

THE DALLAS COUNTY EXPERIENCE

Stanley Mozee and Dennis Allen

Writ Relief Granted January 10, 2018 (2018 WL 345057 and 2018 WL 344332)

Mozee and Allen convicted largely on the basis of jailhouse informants.

Informants testify at trial that they had no deal with state, had not asked for a deal and did not expect a deal.

Letters to prosecutor found in District Attorney's file from informants, written prior to trial, asking when the prosecutor was going to follow through with the deals he had promised them.



JAILHOUSE INFORMANT TESTIMONY

***Giglio v. U. S.*, 405 U.S. 150 (1972)**

Agreement between state and informant for consideration of leniency to informant is *Brady* material

***Napue v. Illinois*, 360 U.S. 264 (1959)**

Prosecutor's failure to correct false testimony from informant that he had received no promise of consideration in return for his testimony violates due process

Jailhouse Informant Testimony

***Duggan v. State*, 778 S.W.2d 465 (1989)**

No difference between express agreements and “those agreements which are merely implied, suggested, insinuated or inferred.”

Both are covered under *Brady* and must be revealed.

WEARRY V. CAIN,
136 S.Ct. 1002 (2016)

State failed to disclose that, contrary to the prosecution's assertions at trial, Brown had twice sought a deal to reduce his existing sentence in exchange for testifying against Wearry. The police had told Brown that they would "talk to the D.A. if he told the truth."

ART. 38.075, C.C.P.

Corroboration of Certain Testimony Required

- (a) A defendant may not be convicted of an offense on the testimony of a person to whom the defendant made a statement against the defendant's interest during a time when the person was imprisoned or confined in the same correctional facility as the defendant unless the testimony is corroborated by other evidence tending to connect the defendant with the offense committed.**
- (b) Corroboration is not sufficient for the purposes of this article if the corroboration only shows that the offense was committed.**

ART. 38.075, C.C.P.

(c) Evidence of a prior offense committed by a person who gives testimony described by Subsection (a) may be admitted for the purpose of impeachment if the person received a benefit described by Article 39.14(h-1)(2) with respect to the offense, regardless of whether the person was convicted of the offense.

ART. 2.024, C.C.P.

Tracking Use of Certain Testimony

Requires attorney for the state to track the use of jailhouse snitch testimony, including any benefits offered or provided to a person in exchange for the testimony.

FALSE CONFESSIONS

False confessions are one of the leading causes of wrongful convictions analyzed in a recent report released by the National Registry of Exonerations

The Registry reports that the primary reason for false confessions is coercion – occurring in at least 60% of the false confession cases analyzed.

According to the Registry, 75% of documented false confessions occurred in homicide cases.

FALSE CONFESSIONS

Why do innocent people confess? Some reasons include:

- **Duress**
- **Coercion**
- **Diminished Mental Capacity**
- **Mental Impairment**
- **Ignorance of the Law**
- **Fear of Violence**
- **Actual Infliction of Harm**
- **Threat of Harsh Punishment**
- **Promise of Benefit**

FALSE CONFESSIONS

Christopher Ochoa, Travis County

Sexual Assault and Murder in Austin

After lengthy interrogation, Ochoa confessed

Another man later confessed

DNA matched the other man

FALSE CONFESSIONS

- **Stephen Brodie, Dallas County**
- **Five year old girl abducted from her home and molested**
- **Brodie, who was deaf, was interrogated, without a sign language interpreter, for 18 hours over 8 days and confessed**
- **Fingerprint found on the window screen matched a convicted child rapist who was suspected in similar assaults**
- **Dallas County Conviction Integrity Unit agreed Brodie was innocent and conviction vacated**

ART. 2.32, C.C.P.

Electronic Recording of Custodial Interrogations

Requires audio visual or audio recording if audio visual recording is unavailable of custodial interrogation of person suspected of committing certain serious offenses.

CHANGING SCIENTIFIC EVIDENCE

**QUESTION: HOW SHOULD COURTS
RESPOND TO CHANGES IN SCIENCE
UNDERLYING CONVICTIONS**

NEW STATUTE CONCERNING WRITS BASED ON NEW SCIENTIFIC EVIDENCE

Art. 11.073. Procedure Related to Certain Scientific Evidence.

**(a) This article applies to relevant scientific
evidence that:**

- (1) was not available to be offered by a
convicted person at the convicted person's trial;
or**
- (2) contradicts scientific evidence relied on by
the state at trial:**

(b) A court may grant relief if . . . :

(A) relevant scientific evidence is currently available and was not available at the time of the convicted person's trial because the evidence was not ascertainable through the exercise of reasonable diligence by the convicted person before the date of or during the convicted person's trial; and

(B) the scientific evidence would be admissible under the Texas Rules of Evidence . . . ; and

(2) the court . . . finds that, had the scientific evidence been presented at trial, on the preponderance of the evidence the person would not have been convicted.

(c) For purposes of a subsequent writ, a claim or issue could not have been presented in a previously considered application if the claim or issue is based on relevant scientific evidence that was not ascertainable through the exercise of reasonable diligence by the convicted person on or before the date on which the original application or a previously considered application , as applicable, was filed.

(d) In making a finding as to whether relevant scientific evidence was not ascertainable through the exercise of reasonable diligence on or before a specific date, the court shall consider whether the field of scientific knowledge, a testifying expert's scientific knowledge, or a scientific method on which the relevant scientific evidence is based has changed since . . .

CHANGING SCIENTIFIC EVIDENCE

Ex parte Robbins, 360 S.W.3d 446 (2011)

Court concluded that Robbins “failed to prove that the new evidence unquestionably establishes his innocence.” Actual innocence claim rejected

ROBBINS I MAJORITY

Despite all experts agreeing that Dr. Moore's findings and testimony were incorrect, majority refused relief because none of the experts affirmatively proved that "Tristen could not have been intentionally asphyxiated." Majority concluded Robbins did not "have a due process right to have a jury hear Moore's re-evaluation."

EX PARTE ROBBINS (ROBBINS II)
478 S.W.3d 678 (2014)
rehearing denied 2016

**Robbins case reconsidered under Art.
11.073 and relief granted**

**Medical Examiner's reconsideration of
her opinion was new scientific evidence
that contradicted scientific evidence
relied upon by the state at trial.**

EX PARTE STEVEN MARK CHANEY,
563 S.W.3d 239 (2018)

**Relief granted under 11.073 on murder case
based on change in body of scientific
knowledge in field of bitemark comparisons**

**Experts opinions that human bitemarks were
unique and an individual could be identified as
source of bitemark discredited by new science.**

**EX PARTE RICHARD BRYAN KUSSMAUL,
ET AL, 548 S.W.3d 606 (2018)**

**Relief granted under 11.073 to four
defendants, three who pled guilty to
sexual assault, and one who was
convicted of capital murder**

**Y-STR DNA testing results were
exculpatory to all four defendants and
constitute new scientific evidence**

EX PARTE RICHARD BRYAN KUSSMAUL, ET AL

A showing by a mere preponderance of the evidence that an applicant would not have been convicted if exculpatory DNA results are obtained is not sufficient to warrant relief on the basis of actual innocence, but statute governing procedure on new scientific evidence (Art. 11.073) affords an avenue for relief under the preponderance standard.

EX PARTE HENDERSON,
384 S.W.3d 833 (2012)

Child dies of head injury.

Henderson says she dropped child.

Medical Examiner testified that it was impossible for child's brain injuries to have occurred in the way Henderson stated. Medical Examiner says child's injuries resulted from a blow intentionally struck by Henderson.

EX PARTE HENDERSON

Henderson submits evidence that recent advances in biomechanics suggest that it is possible that child's head injuries could have been caused by an accidental short-distance fall. Additionally, Medical Examiner submitted an affidavit which recanted his testimony.

EX PARTE HENDERSON

Court finds new scientific evidence shows that a short distance fall could have caused the head injury.

Court finds new scientific evidence did not establish that Henderson was actually innocent but that it did establish a due process violation.

DOG SCENT DISCRIMINATION
WINFREY V. STATE,
323 S.W.3d 875 (2010)

- “ . . . scent-discrimination lineups, when used alone or as primary evidence, are legally insufficient to support a conviction.”**
- “ . . . dangers inherent in the use of dog tracking evidence can only be alleviated by the presence of corroborating evidence.”**

FALSE TESTIMONY ON TESTING REGARDING SEXUAL ATTRACTION TO CHILDREN

***In the Matter of M.P.A.,
364 S.W.3d 277 (Tex. 2012)***

**65% accuracy rate not sufficient reliability
for admission in evidence.**

INEFFECTIVE ASSISTANCE OF COUNSEL

- ***Strickland v. Washington*, 466 U.S. 668 (1984), test requires Applicant to show:**
 - 1. Counsel's performance was deficient.
Requires showing that counsel made errors so serious that counsel was not functioning as the counsel guaranteed by the Sixth Amendment.**
 - 2. The deficient performance prejudiced the defendant.**

PRESENTATION OF PERJURED TESTIMONY

**Due process violated by state's
unknowing presentation of perjured
testimony in murder prosecution.**

***Ex Parte Chabot*, 300 S.W.3d 768 (2009)**

EX PARTE STEVEN MARK CHANEY, 563

S.W.3d 239

(Tex. Crim. App. 2018)

Expert testimony that there was only one to a million chance that someone other than defendant was source of bitemark on victim's forearm was false.

STANDARD FOR RELIEF BASED ON FALSE EVIDENCE

- 1. Evidence was false.**
- 2. False evidence was material to conviction.**



Texas Leads the Country Legislative Actions

- **Art. 2.023 – Tracking of Jailhouse Informants**
- **Art. 38.075 - Corroboration of Jailhouse Informants**
- **Art. 38.075 – Impeachment Testimony Regarding Jailhouse Informants**
- **Art. 2.32 – Electronic Recording of Custodial Interrogations**
- **Chapter 64 – DNA Testing**
- **Art. 39.14 – Michael Morton Act**



Texas Leads The Country **Legislative Actions**

- **Art. 38.43 – Retention of Biological Evidence**
- **Art. 38.01 – Forensic Science Commission**
- **Art. 38.20 – Photographic and Live Lineup Procedures**
- **Art. 38.141 – Corroboration of Testimony of Undercover Informant**
- **Art. 11.073 – Writs Based on New Science**
- **Tim Cole Advisory Commission on Wrongful Convictions**
- **Tim Cole Exoneration Commission**
- **Compensation For Wrongfully Imprisoned**
- **Tex. Civ. Prac. & Rem. Code 103.001, et seq.**
- **Art. 38.075 – Corroboration of Jailhouse Informant**
- **Art. 2.32 – Recording of custodial interrogations**



Texas Leads the Country **Judicial Actions**

- ***Tillman v. State*** - expert testimony on eyewitness identification
- ***Winfrey v. State*** – dog sniff lineups
- ***Ex parte Henderson*** – child head injuries
- ***Ex parte Elizondo*** - actual innocence as ground for writ
- **San Antonio Four** – actual innocence finding
- ***Ex Parte Chaney*** – actual innocence finding
- ***Ex Parte Miles*** – actual innocence finding

SUPPORTING TEXAS COMMUNITIES



Our contribution to Texas doesn't end at the tracks. The BNSF Foundation contributed more than \$2 million to various local charities in 2020.



Conviction Integrity Units Expand Beyond Lone Star State Roots

Dallas County established the first conviction integrity unit in the United States in 2007. Now there are 24 such units across the country that work to identify and correct false convictions.

BY NOAH FROMSON, MEDILL NEWS SERVICE MARCH 12, 2016 6 AM CENTRAL



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REPUBLIC



Thomas Bougher

*Correction appended

In 2007, the new district attorney of Dallas County partnered with the Innocence Project of Texas to review over 400 old cases, many involving denied requests for DNA testing, because the county had the highest number of wrongful convictions in the country.



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Philadelphia News



The battle in Philly DA's Office: Conviction Integrity Unit report shows rocky path to reform

The report celebrates 21 exonerations, but acknowledges extraordinary friction the CIU faces from the courts, the Philadelphia Police Department, and even from within the District Attorney's Office.



DA Larry Krasner, front left, shown here at a press conference with a report detailing the work of the Conviction Integrity Unit from January 2018 to June 2021, behind him (Left to Right starting with back center) Chester Hollman III, Theophilis Wilson, Jimmy Dennis, Christopher Williams, Patricia Cummings, Supervisor, Conviction Integrity Unit, and Terrance Lewis, at City Hall in Philadelphia, June 15, 2021.

JESSICA GRIFFIN / Staff Photographer

by Samantha Melamed
Updated Jun 15, 2021

Since District Attorney Larry Krasner took office in 2018, the Conviction Integrity Unit he created has become one of the largest and most active in the country. It's produced 21 exonerations and has 88 more active investigations. And it has developed a police-misconduct database that has led prosecutors to decline 447 cases, and crafted office-wide policies including an open-file discovery protocol — a first for the city — that could help prevent the errors of the past from being repeated.

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Dallas Exoneration Hearing

